

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAULA ROBINSON,

Plaintiff,

-against-

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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13-cv-2370 (NSR) (LMS)

ORDER ADOPTING REPORT
AND RECOMMENDATION

NELSON S. ROMÁN, United States District Judge

Paula Robinson (“Plaintiff”), proceeding *pro se*, seeks review under 42 U.S.C. § 405(g) of a decision by the Commissioner of Social Security (“Defendant”) awarding her Social Security Disability Insurance Benefits. Defendant moved to dismiss the action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). This case was previously referred to Magistrate Judge Lisa M. Smith on April 19, 2013. Judge Smith issued a Report and Recommendation (“R & R”) on June 5, 2014 recommending that this Court grant Defendant’s motion. For the following reasons, this Court adopts Judge Smith’s R & R in its entirety and grants Defendant’s motion to dismiss.

I. Background¹

On October 24, 2008, Plaintiff filed an application for Social Security Disability Insurance benefits alleging that disabilities of diabetes, a liver problem, and vision impairment resulted in an inability to work as of July 22, 2008. Her claim was denied on January 21, 2009.

¹ Facts are taken from the R & R, unless otherwise noted.

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After Plaintiff filed a written request for a hearing, Administrative Law Judge (“ALJ”) Jeffrey M. Jordan conducted a hearing regarding Plaintiff’s application on January 27, 2010. The ALJ denied Plaintiff’s application, finding that she was not disabled under the meaning of the Social Security Act. Plaintiff requested review of that decision which was granted by the Social Security Appeals Council on February 23, 2011.

Plaintiff appeared *pro se* before ALJ Kenneth Scheer at a second hearing where ALJ Scheer conducted a *de novo* review of Plaintiff’s application. As a result of an MRI Plaintiff underwent on October 29, 2010 ALJ Scheer found that Plaintiff had disc herniations which qualified as a disability. ALJ Scheer informed Plaintiff that his determination meant that she would qualify for disability as of October 29, 2010 but not before that date, as her original application requested. He asked Plaintiff if she wished to amend the date of the onset of her disability in her application. Plaintiff acquiesced and ALJ Scheer deemed the onset date in her application amended from July 22, 2008 to October 29, 2010.

Plaintiff requested review of ALJ Scheer’s decision by the Appeals Council on September 7, 2011 which was denied on March 15, 2013. Plaintiff commenced this action on April 9, 2013. After filing an answer, Defendant made the instant motion to dismiss on September 10, 2013.

On June 5, 2014, Magistrate Judge Smith issued the R & R recommending that this Court grant Defendant’s motion to dismiss. Neither party has filed written objections to the R & R.

II. Discussion

A magistrate judge may “hear a pretrial matter [that is] dispositive of a claim or defense” if so designated by a district court. Fed. R. Civ. P. 72(b)(1); *accord* 28 U.S.C. § 636(b)(1)(B). In such a case, the magistrate judge “must enter a recommended disposition, including, if

appropriate, proposed findings of fact.” Fed. R. Civ. P. 72(b)(1); *accord* 28 U.S.C. § 636(b)(1).

Where a magistrate judge issues a report and recommendation,

[w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings or recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b) (emphasis added); *accord* Fed. R. Civ. P. 72(b)(2), (3). However, “[t]o accept the report and recommendation of a magistrate, to which *no timely objection* has been made, a district court need only satisfy itself that there is *no clear error* on the face of the record.” *Wilds v. United Parcel Serv., Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003) (emphasis added) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985); *accord* *Feehan v. Feehan*, No. 09 Civ. 7016 (DAB), 2011 WL 497776, at *1 (S.D.N.Y. Feb. 10, 2011); *see also* Fed. R. Civ. P. 72 advisory committee note (1983 Addition, Subdivision (b)) (“When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”).

As neither side has filed objections to Judge Smith’s March 5, 2014 R & R, this Court reviews the R & R for clear error. The Court is satisfied that this is no error on the face of the R & R. The Court adopts Judge’s Smith reasoning that this Court lacks subject matter jurisdiction over this case because “judicial review over Social Security determinations pursuant to 42 U.S.C. 405(g) ‘makes no provision for judicial review of a determination favorable to the complainant[.]’” *Heller v. Comm’r of Soc. Sec.*, 328 F. App’x 74, 74 (2d Cir. 2009) (quoting *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir. 1978)), and consenting to the amendment of the date of onset of disability in a petition before an ALJ is considered a favorable determination. *See*,

e.g., Bruno v. Astrue, 09 Civ. 4690 (JSR) (DF), 2010 WL 5453398 (S.D.N.Y. Sept. 16, 2010).


Thus, there is no clear error in Judge Smith's R & R granting Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).

III. Conclusion

Accordingly, the Court adopts Magistrate Judge Smith's Report and Recommendation in its entirety. Defendant's motion to dismiss is, therefore, GRANTED. The Clerk of Court is respectfully requested to terminate the motion at Docket Number 18. The Clerk of Court is directed to close this case.

Dated: July 23, 2014
White Plains, New York

SO ORDERED:



NELSON S. ROMÁN
United States District Judge